

# **For Judges: Suggestions About What to Say About ADR at Case Management Conferences—and How to Respond to Concerns or Objections Raised by Counsel**

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## **I. INTRODUCTION**

The primary purpose of this essay is to provide judges with ideas about how to respond to commonly articulated concerns or objections when the court asks parties whether their case should be referred to ADR. What we model here is a dialogue between bar and bench at a case management conference. The goal is to foster exchanges that will encourage open-minded and fully informed consideration of whether it would be sensible to try using some form of ADR in the case. In the second section of this essay we also suggest some considerations judges might take into account when they are trying to decide whether to compel participation in ADR when a party, after considering the court's comments, declines to participate voluntarily.

This essay is formatted to provide judges with material that is readily usable. The setting is a case management conference relatively early in the pretrial period. The judge first raises the question of whether it would be appropriate to refer the case to some form of ADR. Thereafter, the bulk of the material consists of exchanges between counsel and the court. The lawyer articulates, one at a time, various reasons why referral to ADR would not be appropriate. Each such articulation is followed by a suggested response from the judge.

The objections or concerns that the lawyers articulate here represent some of the most common sources of reluctance to give ADR a try. One purpose of this piece is to suggest how judges might appropriately and helpfully respond to each of these oft-heard reasons for skepticism about how much good an ADR process might do.

In these dialogues with counsel, the judge's tone is intended to be constructive. Her goals are two-fold. First, to assure the parties that she understands and takes seriously their concerns. Second, to make sure that the parties' decisions about whether to use ADR in the case at hand are fully informed and carefully considered. Toward that end, the judge not only asks questions, but also provides information and perspectives gained from her knowledge of what other parties in other cases have concluded about the various benefits that ADR can deliver.

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There are a few important points to emphasize before we turn to the dialogues. Our hypothetical judge works in a court that sponsors more than one ADR process—so her conversations with the parties are not limited to the pros and cons of “mediation.” Instead, she tries to encourage counsel to understand that there are several quite distinct forms of ADR and that each of the different processes is accompanied by a unique set of advantages and disadvantages. ADR “neutrals” can play a wide range of roles—and can offer a variety of different kinds of assistance. The processes, in other words, are not fungible. Mediation, for example, might be especially good for pursuing some kinds of goals, or for responding to some kinds of problems or needs, but it is not as good a tool as early neutral evaluation (ENE) for pursuing other objectives or addressing other kinds of needs.

Our judge also is trying to make a related point that is just as critical. ADR can be successfully used to achieve a wide range of ends, only one of which is settlement. Our judge will try to expand the parties’ vision of the various kinds of things they might accomplish through ADR—to make sure they understand that there are many different values or interests that they can use ADR to advance and many different kinds of benefits that participating in ADR can yield. One of the goals of these dialogues is to encourage the parties to identify the interests or needs that are most important to them, then to select the ADR process that is likely to deliver the most toward those ends.

We also need to acknowledge that what a judge says about ADR in these kinds of dialogues could vary substantially not only with the primary purposes of the ADR referral, but also with the juncture at which and the circumstances in which the issue is under consideration. Trying to cover all these bases would result in an essay so long no one would read it. So we have elected to focus on the setting in which it is most useful (and, hopefully, most common) for the court to explore with the parties the appropriateness of referring the case to some form of ADR: a case management conference relatively early in the pretrial period.

## II. SETTING: EARLY CASE MANAGEMENT CONFERENCE AND NEITHER PARTY HAS PRESSED FOR A REFERRAL TO ADR

### A. *Explain Why You Are Raising the Issue of ADR*

#### JUDGE:

*It is part of my normal case management process to discuss whether it would be beneficial to you and your clients to use some form of ADR in this case.*

*Before we discuss this matter, though, I want to tell you why I raise*

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*it. I'm concerned that some people might misunderstand the court's purposes here. My goal certainly is not to pressure anyone. And I'm not trying to get rid of you, or to send you off into some other system in order to reduce backlogs. There will always be a line of cases here, and how long that line is doesn't affect me much—I will continue to work roughly the same number of hours.*

*I raise the issue of ADR with you because I believe that part of my job is to help you figure out how to resolve the problems that brought you here in as constructive a spirit and efficient a manner as possible. I am paid by the taxpayers to serve—to serve people like you and your clients. And an important part of that service is to help you determine whether it makes sense—in terms of values and interests that are important to your clients—to try some form of ADR.*

*So I raise this issue not to sell, but to reason with you about which kinds of processes would make most sense for your clients in the specific circumstances of this case.*

*Of course, I'm not raising this issue in a vacuum. As you understand, by now there is a great deal of experience with ADR around the country—and litigants in a huge range of circumstances have used ADR successfully. Congress recognized that fact when it enacted the ADR Act of 1998—which requires every district court in the country to establish an ADR program and to make ADR available in civil cases. I also should emphasize that there is a broad range of different purposes for which parties have used ADR successfully.*

*Sometimes they have used ADR to achieve settlement earlier or with lower transaction costs. Sometimes they have used it to fashion terms of settlement that a court could not make part of a judgment. Sometimes parties use ADR to make the case development process more rational and efficient and better focused. And sometimes they use it simply to enable the parties themselves to understand the situation better or to participate more directly.*

*So even when ADR has not directly produced a settlement, it often has proved valuable either because it paved the way for a settlement reached later on, or because it helped the parties understand more clearly what separated them and thus equipped them to create an efficient case development plan that focused on the issues that really were most important.*

*In short, ADR is a potentially important tool—for settlement and for case management—that all of us need to consider.*

*B. Ask What Consideration Counsel and Client Have Given to Using ADR in the Case at Bar*

Next, ask counsel if they have given thought to the possibility of using ADR and if they have discussed this question with their clients. Starting with counsel for plaintiff, you might ask each lawyer, seriatim:

**JUDGE:**

*What consideration have you and your client given to the possibility that it might be beneficial to try using some form of ADR in this case?*

*C. Briefly Explain What the ADR Processes Are*

If counsel's response suggests that only superficial consideration has been given to this possibility, you might explain briefly what the ADR procedures are that have been used by other litigants in your court. It is important to ask counsel explicitly to share this information with his client—and to order him, by a date you specify, to report back to you (e.g., in a letter, copying the other counsel) the product of his and his client's joint consideration of these possibilities. You might say, for example:

**JUDGE:**

*As you know, Mr. Jones, parties in this court have used mediation, early neutral evaluation, non-binding arbitration, and, occasionally, non-binding summary jury or bench trials. We have prepared written materials (such as local rules, a brochure, and a handbook) that describe these procedures and discuss their advantages and limitations. My clerk will provide you with copies so you can share them with your client and discuss the options.*

*Which particular procedure makes most sense to use can vary with the specific circumstances of the case and with what the parties are trying to use ADR to achieve. Settlement, of course, is often the primary goal, but not always.*

*When the primary purpose is to try to settle the case, it is important to try to identify what the main obstacles to settlement might be—because there are substantial differences between ADR procedures in how well they address different kinds of obstacles to settlement.*

*For example, early neutral evaluation (ENE) often offers parties the greatest benefits if the major impediment to productive settlement discussions is lack of information, or if what primarily separates the*

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*parties is an analytical disagreement about liability or damages. ENE provides a structured environment for developing and sharing key information, and it offers both parties access to analytical feedback (evaluative inputs) from a neutral with subject matter expertise.*

*On the other hand, if the primary need is to vent and come to terms with emotions, or to improve communication across party lines, or to search more thoroughly for solution options that are responsive to the parties' situations both within and outside the litigation, then mediation might well be a more effective tool.*

*Or non-binding arbitration might well be the best bet if what one or more of the clients really needs before they will feel prepared to talk seriously about settlement is to have something close to 'their day in court,' that is, to go through a proceeding that gives them a full chance to tell their story, to see how their evidence compares to the other side's evidence, and to learn what judgment impartial persons would render.*

*But please remind your client that advancing prospects for settlement is definitely not the only benefit a good ADR procedure can deliver. For example, a procedure like ENE might help streamline and focus the pretrial process—and thus save your client time and money. So some form of ADR might be useful even if the prospects for settlement at this juncture are very poor.*

*How much time would you and your client need to go over the written material and to consider the various ADR tools that you might use here?*

*Fine; then please send me a letter (copying the other lawyers) by that date telling me, in general terms, what you and your client think about giving one of these procedures a try in this case.*

### D. Participation by Clients in the Decision About Whether to Try ADR

Clients themselves should play a central role in the process that leads to a decision about the wisdom of using ADR.

The Northern District of California requires both the parties and their lawyers to certify, before the initial case management conference, that they have read our ADR brochure, discussed the ADR process options, and considered whether their case might benefit from use of any of the available ADR procedures.<sup>1</sup>

Occasionally (presumably not regularly), the judge might consider having the clients present (by phone or in person) at the case management conference

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<sup>1</sup> N.D. CAL. ADR R. § 3-5(b) (effective May 2000).

for further conversation about the appropriateness of using ADR. Having the clients present for such conversations might be appropriate if: (1) the judge is not sure that the clients have been or will be fully informed by the lawyers on these questions, (2) the wisdom of referring the case to ADR depends heavily on attitudes or capacities of the clients that are difficult to determine through the lawyers, (3) the judge wants to give a pep talk directly to the parties about taking advantage of the opportunities that ADR can offer, or (4) the judge wants to increase direct party participation in the important decisions about how the litigation is handled—either as a matter of principle or to capitalize fully on the clients themselves as sources of economic discipline.

But if you consider having the parties themselves present (again, by phone or in person) for further conversation about ADR, it is important to be sensitive to the real possibility that the lawyers might feel that you are trying to invade their relationship with their client. Counsel also might fear that your real purpose is to pressure the clients, or even to criticize the lawyers as greedy or unprofessional. And some lawyers will be afraid of “losing control” over the client, or over what information flows from the client to the court or to the opposing side.

I suggest that you acknowledge these possible concerns directly to the lawyers and offer reassurance. You might say, for example:

**JUDGE:**

*In some of my cases, I have asked that the clients be present when we discuss further whether it would make sense, from the parties' perspective, to try using ADR. Let me explain why I would like your clients to be present (in person or by phone) when we next discuss this question.*

*The courts have been vigorously criticized in some circles for ignoring the parties—for leaving them out and for using procedures and vocabulary that are obscure and alienating. I want clients to understand that this court is here to serve them—and to try to assist them in addressing the problems that brought them here. I want them to understand that I know whose case this is—it is not the court's case, it is theirs.*

*I also want to acknowledge, directly to them, that court procedures can be intimidating and confusing to non-lawyers, and that one of my goals is to reduce the foreignness and the formality of the work that is done in the judicial system.*

*I assure you that I have no intention of pressuring anyone into ADR—and I will tell the parties that directly. When we are all together to discuss this matter, we will be on the record, so that everyone can feel*

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*protected—and I will not press for information or commitments that you and your clients do not feel prepared to offer or make.*

### E. Responses to Specific Types of Objections

If one or more of the lawyers says that he and his client have considered ADR but are reluctant to try it, *explore why* (try gently to identify the source of that reluctance)—*then respond*.

Each of the sections that follows begins with one kind of reason that a lawyer might offer for not being interested in using ADR in the case at bar. Immediately following each such reason or objection, I suggest ways the judge might respond.

#### 1. “We’ve Already Tried Settlement Negotiations, and We Are Way Too Far Apart”

**LAWYER:**

*Your honor, we’ve already tried to settle the case through direct negotiations—in fact, the lawyers and the clients got together to try to settle before the case was filed, but we didn’t even get in the same stadium.*

**JUDGE:**

*Without disclosing the content of your settlement communications, or the parties’ settlement positions, can you tell me whether you were able to identify in your pre-filing negotiations what separated you (i.e., why you were so far apart?).*

**LAWYER:**

*Not really—each side just presented the arguments in its favor and made an offer or demand—and the figures were very far apart.*

**JUDGE:**

*A good ADR neutral, for example, a good mediator, is trained to help you understand why you are so far apart—to help you identify what separates you—and, at least as important, to help you look beneath bargaining positions to try to identify underlying interests, and*

*to help you look for ways to develop solutions that would be best for both parties.*

*There are several kinds of problems that commonly arise in negotiations that a good mediator can help you avoid. In other words, a good mediator can reduce the risk that some artificial, avoidable problem will prevent you from reaching a settlement. Let me be more specific. Sometimes parties fail to reach a settlement because they misread signals from one another, or they simply misjudge what is possible (i.e., what terms the other side might be willing to accept). A good neutral can reduce this problem by meeting with the parties in a series of private caucuses, earning their trust, and getting a more reliable read on what terms they really would consider. Parties often will be more frank and more flexible when they deal privately with a neutral they trust than when they deal directly with one another. This is especially true if they have confidence that the neutral will keep their secrets. When she has learned in secret from each side what it might consider, a neutral is able to make a more accurate judgment about whether settlement is possible than each side would be able to make in unassisted negotiations.*

*A good neutral also can reduce the distorting role of what the professors call 'reactive devaluation.' That fancy phrase refers to the tendency in negotiations to discredit or distrust or 'de-value' an idea or proposal simply because the other side came up with it.*

*To attack this problem, the neutral herself can be the source of proposals. A good neutral will offer solution ideas only after working with the parties for a substantial period and only with their permission. But if a neutral makes a suggestion, the parties can assess it on its own merits—without the knee-jerk "devaluation" they might give the same suggestion if it were made by an opponent.*

*Involving a neutral also can help contain the negative effects of personality clashes or interpersonal frictions. Sometimes the personality of one of the parties or lawyers needlessly hurts the negotiation dynamic. And sometimes attorneys or parties just don't like one another, or rub one another the wrong way—and those kinds of frictions can needlessly hurt the chances of reaching an agreement. A good mediator can neutralize these kinds of problems by the example she sets, by the way she requires the negotiators to treat one another, and by using private caucuses to keep the people who push each other's buttons from interacting more than is necessary.*

*As these examples suggest, there are many ways that a good neutral can reduce the risk that your negotiations will fail for some avoidable reason.*



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*In addition, a good neutral could help you determine whether there really are some legal or factual issues that need to be addressed before negotiations might be fruitful. The neutral could help you develop an efficient, low-cost plan for getting key additional information you might want and thus can help you save the time and money that you might otherwise spend on discovery or motion work that really isn't that important to disposition.*

*Of course, a good mediator also will make sure that the tone of your discussions remains fully constructive. And she can make sure that you don't give up on your negotiations prematurely.*

### **2. "ADR Is Too 'Touchy Feely'"**

**LAWYER:**

*Judge, ADR is a touchy-feely process that is only useful in cases involving personal or emotional issues, and this case turns on hard reasoning about law and evidence, so we don't need mediation.*

**JUDGE:**

*There is a wide range of roles that our ADR neutrals have successfully played. If the parties want their neutral to provide evaluative input, they can get a neutral who has deep subject matter expertise and who will offer analytical assessments of the strengths and weaknesses of various claims and defenses, or of specific lines of reasoning or evidence.*

### **3. "Any 'Evaluation' We Get from the Neutral Will Be Calculated to Encourage Settlement and Will Not Be Objective"**

**LAWYER:**

*Your honor, we won't have any confidence in the objectivity of the neutral's evaluations because we know that he will split the baby in order to try to get us to settle. He'll offer his 'analysis' only after he has met with each side privately, and what he will really be trying to figure out in those secret sessions is what settlement ranges the parties might agree to. Only then will he provide 'an evaluation' which will just happen to fit the outcome that he senses the parties might accept.*

**JUDGE:**

*I understand that concern. Let me suggest a straightforward way of dealing with it. During the phone conference you will have before your ADR session, tell your neutral, respectfully but clearly, that you have this concern, that you discussed it with me, and that I asked you to raise it with the neutral. You also can tell him or her that I reassured you that if the parties asked their neutral for an objective evaluation, their neutral would provide just that.*

*We have selected and trained our neutrals carefully. They are smart and highly ethical professionals. They have demonstrated over and over that they know the difference between being a neutral and being an advocate, and that they are fully capable of giving an objective, fair assessment of a case.*

*We also have made sure that they understand the difference between the judgment value of a case and the settlement value of a case. If you make it clear to your neutral that what you want is a judgment value, rather than a settlement value, that is what you will get. Of course, you might want both. If so, you will get both.*

*Let me make another suggestion that is responsive to this concern. If you and the other parties want to, you can structure your ADR event so that every party will know everything that the neutral knows about the case before the neutral offers any substantive assessment or evaluation. You can agree to structure your session so that there are no ex parte communications with the neutral before she prepares her assessment, so every party and lawyer would be present while there is any communication with the neutral. This would enable you to know all of the information that might be affecting the neutral's assessment and would remove the risk that the neutral might permit factors that are relevant only to the settlement dynamic, but not to an objective assessment of the merits of the case, to affect any evaluative assessment the parties might ask her to give.*

*Another way to reassure yourself about the objectivity of any evaluation by the neutral is to ask her to explain, with some precision, the basis for her views. After she lays out how she reasoned toward her assessment, you will be well-positioned to determine how 'objective' and useful that assessment might be.*

*Of course, you might decide that you want your neutral to play only a facilitative role, in which case she would not be developing an evaluation or assessment of the case.*

*You also should bear in mind that the parties could agree to structure their ADR event so that after the neutral develops an*

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*evaluation, she changes hats and tries to facilitate settlement through a series of meetings with one side at a time.*

### 4. *“The Real Purpose of ADR Is to Pressure Us to Settle”*

**LAWYER:**

*Judge, let's be honest, the purpose of mediation is to pressure us to settle. We know that when all the verbal dust settles the mediator will really push us toward a settlement. And along the way he will invade my relationship with my client. He will be trying to bypass me and to influence my client to follow his advice instead of mine.*

**JUDGE:**

*The court's purpose in offering ADR is to be helpful. It is clearly not to pressure anyone to settle. In fact, the ethical rules under which every one of our neutrals practices expressly prohibit the neutrals from pressuring or coercing anyone. The court feels very strongly about this and we have gone out of our way to make sure that our neutrals fully understand the spirit in which we expect them to serve.*

*We've also established by local rule a procedure through which you can register complaints about how any of our neutrals handle their responsibilities. If one of our neutrals pressures you or your client to accept a settlement, you should submit a complaint directly to the ADR Magistrate Judge—who, I can assure you, will follow up promptly and thoroughly. We also send questionnaires to all lawyers and parties after each ADR event in our program, so we can learn directly from participants if they feel that one of our neutrals has not handled his or her responsibilities appropriately. Of course, all of our neutrals know about these reporting mechanisms, and that knowledge, by itself, substantially discourages any conduct that might be perceived as out of line.*

*I want to emphasize that if we refer your case to ADR it will be because we want to give you opportunities that traditional litigation does not provide—opportunities to participate in less rigid and formal procedures that you and your clients can use to see whether you can resolve your dispute faster, at less cost, or in more satisfying ways.*

*And don't forget, we permit you to choose your own neutral. You can select someone all of you trust, someone you know will not pressure you in any way.*

*Plus, under our rules you can and should reach agreement with your neutral, before the ADR event takes place, about what role you want him or her to play during the ADR proceedings. You can agree, for example, that your neutral will do nothing more than create a setting in which you (the parties and counsel) can discuss the case and your options. If you want to, you can agree with your neutral that he will not provide any analytical or evaluative inputs at all and will not even try to suggest any possible terms of a settlement.*

*I should also remind you that our rules expressly permit you and your client to withdraw from an ADR proceeding if, after giving the process a reasonable chance, you conclude that further participation would not be productive. Therefore, if your neutral starts behaving in a way that makes you or your client feel uncomfortable, you can just leave.*

### **5. “We’re Not Ready; a Referral to ADR Now Would Be Premature”**

#### **LAWYER:**

*Your honor, we appreciate the court’s desire to offer help, but it’s early in the pretrial period and we just haven’t done enough discovery to make ADR worthwhile. We don’t know enough yet about how the evidence will come in to feel comfortable counseling our clients about settlement.*

#### **JUDGE:**

*I appreciate your sense of responsibility and your need for an information base that will enable you to give your client advice in which you have an appropriate level of confidence. I want to suggest that you can use ADR to help meet these objectives—but before I turn to that, I want to emphasize another potentially valuable use of ADR.*

*One important purpose of some kinds of ADR, most obviously mediation, is to help parties make sure that whatever interests and needs they have that reach beyond law and evidence receive an appropriate level of attention in decisions about how to resolve the case. As you know, sometimes the settlement considerations that are most important to the clients don’t really turn on law and evidence. Rather, they turn on other factors, some related to the litigation, some not.*

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*So we want to be sure that we use processes here that will enable us to determine what the considerations and interests are that are most important to the clients. And we want to figure that out early in the pretrial period—before we have gone down a litigation path that might disserve those interests. In other words, to be as responsible as you obviously want to be to your clients, we need to identify, early, the considerations that are most important to the parties. Then we need to be sure that those considerations play the central role that they should play in decisions about whether to settle or how to manage the lawsuit. ADR can be a great tool for doing just that.*

*Let's return to your concern about whether the evidence has been sufficiently developed to try ADR at this juncture. I'd like you to pause a minute and consider how much formal development of an evidentiary record you really need before ADR might be useful in a case like this. You are lawyers with considerable experience and you've had access, through your clients and your investigative work, to some important material. So you already have an information base that, with your experience, gives you some substantial analytical leverage on where this case might go.*

*Like you, I've seen a great many cases, both when I was in private practice and since I have been on the bench, where counsel and the parties have known enough even before the complaint was filed to have useful settlement discussions. So let me caution you against underestimating your capacity to generate respect-worthy advice at this juncture. And this juncture, of course, is where you could save your clients the most transaction-cost money.*

*There are a couple of other points about using ADR now that I'd like you to keep in mind. One is that you could use the ADR process to acquire some of the information that you feel you need, and that you otherwise would be required to use formal discovery to reach. For example, instead of taking the depositions now of the plaintiff and the defendant, you could use a mediation or an early neutral evaluation session to hear what each of the principal players has to say, and to get a feel for how persuasive and sympathetic they might be at trial. You also could have access in an ADR proceeding to the documents that are likely to be most important in the litigation and to the arguments that will be advanced about what those documents tend to prove.*

*And you could agree to structure your ADR event so that each of you has a chance to see not only what the case looks like through the other side's eyes, but also how the other side reacts to your take on the evidence and law.*

*In these ways, an ADR event can present an opportunity for more compact and efficient learning than formal discovery, as well as an opportunity for real exchanges that formal discovery simply does not provide.*

*There's another way that you could use an early ADR event to accomplish something important. Partly because pleading and discovery are such poor tools for communication, there are a fair number of cases in which the parties misunderstand what they disagree about. Too often, parties make mistaken assumptions about what their opponents will contend the facts are, or what the evidence will be. In recent years, good lawyers have been able to use an early ADR event to make sure that they accurately understand what the parties really disagree about, what issues really separate them.*

*So consider using an early mediation or neutral evaluation to identify reliably what divides you. You might learn that it is far less than you thought. If so, you can save your clients a lot of money, and save yourselves a lot of hassles in discovery and motion work, by using the ADR session to develop a pretrial plan in which you do only the work that really needs to be done.*

*You also can use an early ADR event to identify what the principal obstacles to settlement are (instead of just trying to guess what they are). If those obstacles are evidentiary, you can use ADR to fashion a discovery plan that focuses first on what the parties consider important and what other issues take the back burner. If the primary obstacles are legal, you can move directly into motions that will address those questions. So you can use an early ADR event to set the case up for productive settlement negotiations much sooner and more efficiently than would otherwise be possible.*

After making the observations just described, the judge needs to listen with an open mind to counsel's responses. It may be that those responses will persuade the judge that a referral to ADR at this juncture really would be premature. If so, the judge should work with the lawyers to try to identify what needs to be done before engaging in an ADR process. To the extent feasible, the judge should use the initial case management conference to develop a plan and a time frame for completing those tasks. With that time frame established, the court could either (1) order the parties to complete a specified ADR process within a defined period, or (2) set a follow-up conference at which the court could explore with counsel anew the wisdom of trying some form of ADR.

In these settings, I usually propose to counsel a two-stage case development

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plan.<sup>2</sup> In the first stage, they agree to sharply limit their discovery and motion work to what they really need to do before trying mediation or some other form of ADR. At the close of that stage, they have a month or so in which to complete their mediation efforts. At that juncture, they return to court (often by phone) to have a further case development conference with me. If it appears, after listening to counsel at that conference, that further efforts in the ADR arena are insufficiently likely to be productive, we develop a detailed plan to prepare the case for trial.

At the first case management conference, when we set up this two-stage process, I promise the lawyers that I will protect their full discovery and motion rights in the second phase—so they jeopardize no case development rights by agreeing to this approach. I even re-assure them that if, in the first stage, they agree to take focused, limited depositions of the key witnesses, I will permit them to re-notice depositions of those same people in the second stage if doing so is necessary to explore matters that are pertinent to preparation for trial but that were not essential to setting the case up for the ADR proceeding.

### 6. *“Your Honor, We Want to File a Motion to Dismiss”*

If one party says it wants to file a motion to dismiss on substantive grounds before considering mediation, probe a little to try to get a sense of the likelihood that the contemplated motion would dispose of the entire case.

JUDGE:

*Please tell me what the theory would be that would support your motion to dismiss. (Try to get counsel to be as specific as possible.)*

If it appears likely that the motion would dispose of the entire case, and if the party who wants to file the motion does not appear to have any interest that might be benefited by a mediation process that could address other matters, you should simply set a deadline for filing the motion and a hearing date.

On the other hand, if it does not appear likely that the motion would dispose of the entire case, you might respond as follows:

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<sup>2</sup> Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) (discussing two-tiered discovery planning); *Klein v. King*, 132 F.R.D. 525, 529–33 (N.D. Cal. 1990) (imposing upon the parties a two-part discovery process).

**JUDGE:**

*As you appreciate, these kinds of motions can be expensive to litigate, especially if there is any real chance that the issues raised cannot be resolved on the face of the pleadings, but require consideration of some evidentiary materials. In that event, it is likely that some discovery would be necessary under Rule 56(f). But even if you are able to keep your motion from slipping into the Rule 56 arena, I wonder if pursuing a motion at this juncture would best serve your client's interests here.*

*Motions to dismiss do not often result in dismissal of the entire case. And courts usually feel that the law requires them to give the plaintiff another opportunity to state a claim that is legally cognizable—which means that most dismissals are with leave to amend. So the ultimate product of this kind of motion activity, in many instances, is simply a better crafted complaint. The core of the case often remains pretty much intact.*

*Of course, I'm not pre-judging your particular motion, and I'm not prohibiting you from filing it. But I am asking that you consider whether it might be in your client's best long-term interests to try ADR first. You could use ADR to explore the possibility of settling the case early. And at an early mediation you would have available for possible use in settlement the money that your client would have spent on the motion activity.*

*If ADR does not produce an early settlement, or a plan for how to set up productive settlement negotiations efficiently, at least it will give you a clearer understanding of where each side thinks the center of the case is. And you will have a better basis for judging whether any motion activity is likely to be successful at this juncture, which means that any motion papers you file probably would be better crafted.*

**7. “Your Honor, We’re Afraid That if We Go to Mediation but Don’t Settle, You Will Be Upset with Us and Maybe Put Us at the End of the Trial Queue”**

**JUDGE:**

*By agreeing to participate in mediation the parties are in no sense agreeing to settle—they are agreeing only to explore in good faith the possibility of settlement.*

*I understand that sometimes parties who are proceeding in*



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*complete good faith end up disagreeing, reasonably, about how a dispute should be resolved. And there are more than a few cases that are mediated well by all participants but that still need to go to trial.*

*I fully accept that, and I promise that you will not be penalized in any way if you try ADR but cannot agree on a settlement. I will respect the fact that you gave ADR a fair chance, but I yield to no one in my respect for your right to take your case to trial. If you return from ADR without a settlement, your case will hold the same place in the trial queue that it otherwise would have held, and I will bear no one any ill will. In fact, if you want me to, I will fix your trial date right now, and I promise you that I won't move it if you fail to resolve the case through the mediation.*

### **8. “Your Honor, Mediation Would Be a Waste of Time and Money Because We Are Not Going to Settle This Case”**

**JUDGE:**

*I respect the sincerity of that judgment and I am deeply committed to preserving every party's right to trial. However, I would ask that you put yourself in my place for a moment and appreciate how many times I have heard parties say there is no chance the case will settle in cases that eventually settle. As you know, only a tiny fraction of the cases that are filed in our Court go to trial. So it is part of my responsibility to help make sure that this is one of the unusual cases where the parties couldn't take constructive advantage of an opportunity to fashion their own disposition.*

### **9. “Your Honor, Each Side Feels Very Strongly That It Has Been Wronged—Emotions Are Hot”**

**JUDGE:**

*Mediation has proved especially successful in cases involving strong emotions. Sometimes negotiations can't proceed until one or both parties has had a chance to express their anger or other feelings. The mediator can provide a constructive and safe environment for that. Sometimes litigants need to have some neutral person, perhaps someone associated with the court to hear and feel the intensity of their emotion before they are ready to consider resolving their case. So consider using mediation, in part, to clear the emotional way for constructive negotiations.*

10. ***“Your Honor, Each Side Understands the Law and Evidence Fully and is Convinced by Its Own Analysis That It Will Win”***

**JUDGE:**

*I wonder if it would be in the parties' best interests to consider matters in addition to law and evidence? Sometimes other factors play a larger role in figuring out what is best for a particular party. An ADR session, unlike litigation, can give all of you a full opportunity to identify any such considerations and to give them an appropriate level of play in consideration of settlement.*

*The most obvious example is the duty of a fiduciary to pursue the best economic interests of shareholders. That duty requires fiduciaries to attend closely to the relationship between litigation transaction costs and settlement costs. But even when there is no disproportion in that relationship, responsible fiduciaries always have their antennae extended—looking for the best ways to advance the long range interests of the parties they represent. Experienced ADR neutrals are especially skillful at helping parties make sure they identify all their options and don't overlook any opportunities that might exist beyond the four corners of the case.*

*Shifting gears, I also want to respond to the point that each of you feels that you understand the law and the evidence, and that the problem is simply that you disagree, pretty fundamentally, about who will win. I appreciate that each of you has considerable experience in matters like this, and you certainly have much more knowledge than I have about the relevant evidence. But I would ask that you give more thought to the possibility that there might be something valuable left to learn here.*

*When I was in practice, I never had a case where I had nothing to learn from anyone. Because litigation is fundamentally a social process, it is very difficult to predict with certainty what turns it will take and where it will end up. So usually having a fresh, neutral perspective is useful.*

*One arena where input from an objective outsider can be especially valuable is damages. When the value of the damages has any subjective dimension to it, it can be very instructive to learn what kinds of figures a neutral mind thinks are reasonable and likely. So, for example, if I had a case that included a claim for general damages, I would be quite interested in an experienced neutral's sense of what that part of the case is likely to be worth. I would feel that that kind of input would enhance*

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*the reliability of the advice I was giving my client and might help the clients on each side feel the confidence they need to make settlement decisions.*

*Let me suggest this. Instead of trying to think all of this through here in front of me, take a few days to mull this over and to discuss it carefully with your client. Then, by [specified date], each of you send me a letter, copying the other side, indicating whether you would be willing to give ADR a shot here. If I get affirmative responses from both of you, I will arrange a telephone conference so we can talk about the particular kind of ADR session that would be most appropriate and the time frame in which it should occur.*

*Thank you.*

### ***11. “This Case Involves an Unsettled and Important Issue of Public Policy and the Parties Agree That We Need a Public Pronouncement from the Court About What the Law Is in This Area”***

**JUDGE:**

*Let’s pick a trial date.*

### **III. UNDER WHICH CIRCUMSTANCES, IF ANY, SHOULD A JUDGE COMPEL PARTICIPATION IN ADR IF, AFTER A FULL DISCUSSION OF POSSIBLE BENEFITS, ONE OR MORE OF THE PARTIES DECLINES TO PARTICIPATE VOLUNTARILY?**

This is a very difficult question that does not lend itself to a brief and tidy answer. Under the rules in some courts, however, judges may be called upon to make this kind of decision on a case-by-case basis. The thoughts that I offer below are in no sense definitive; instead, they represent only an initial and partial foray into the issues. We obviously need substantial additional dialogue here. I hope merely to contribute to the conversation.

By way of preface, it is important to identify the boundaries within which I am addressing this question. I will *not* try to identify systematically, by subject matter, category of case, or by configuration of circumstance, the kinds of matters that are “most appropriate” or “least appropriate” for referral to ADR. That is a surprisingly complicated undertaking that is well beyond the scope of this essay. The “answers” can vary dramatically with a host of factors, not least of which are the purposes of the particular ADR program, the type of ADR process involved (*e.g.*, facilitative mediation, evaluative mediation, ENE, non-

binding arbitration, or summary jury trial), the kind of neutral (*e.g.*, court staff, attorney volunteer, non-attorney professional, or member of the community without professional license), the nature and relationship of the parties (*e.g.*, pro se litigants, sophisticated institutional litigants, public entities), and the character of the relief sought.

While I cannot identify systematically the kinds of cases or circumstances that are most and least suitable for ADR, I can offer a few general observations in this arena that judges might find useful. The longer I have worked in the ADR field, the less confident I have become that there are many categories of civil actions or configurations of litigation circumstances that should automatically disqualify a case from consideration for any form of ADR. This sense that the universe of cases that should automatically be disqualified is quite small is a product, in part, of the growth of so many different kinds of ADR processes (and so many different roles that ADR neutrals can play) and of the expansion of our appreciation of the range of values to which ADR can contribute.

So the most appropriate way to frame the question is not "Which cases are best suited to ADR?" but, instead, "What are the characteristics of a case, or what are the litigation circumstances, that are most likely to make an order compelling participation in ADR inappropriate?"

Perhaps the most obvious are cases in which events or issues of great moment to the public occupy center stage. In some circumstances, it is very important (to the health of our democracy, among other things) that there be a public trial of an important public matter, or that the courts render decisions on important questions of public policy.

A second circumstance that can counsel against referral to ADR arises when there is a great disparity in power (economic, psychological, intellectual, or otherwise) between the parties and that disparity creates a risk of unfairness in process or outcome that cannot be addressed in an appropriate and adequate manner by the role the neutral plays<sup>3</sup> or the rules that govern the ADR process.

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<sup>3</sup> While I am not sure it is helpful to call a settlement conference hosted by a judge (not the judge with authority over the case) a form of "ADR," it is worth noting that concerns about imbalances in power between the litigants may be less acute when a judge is hosting negotiations and when the parties understand that one of the judge's roles in that setting is to guard against patent abuses of superior strength. On the other hand, judges hosting settlement conferences may well feel uncomfortable with any normative responsibilities because of their views about what it means to maintain the neutrality of the judicial role or because they know that they often will not know enough to be able to meet this kind of responsibility.

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There also will be some instances (rare in most courts) where one or more of the parties just is not equipped, intellectually or emotionally, to adequately look out for their interests, or to participate constructively, in any of the ADR processes that are available.

And very occasionally there are cases whose courses are cynically fixed by sophisticated parties and lawyers whose decisions are dictated simply by pursuit of power (usually, but not always, economic power), or cases whose pretrial fate has little or nothing to do with law or evidence, or even with reason or genuine emotion.

At least for courts of general jurisdiction, however, the percentage of civil matters that meet any of these criterion will be extremely small. Because the range of reasons for which ADR (in at least one of its many forms) could be beneficial is so large, courts should be quite slow to conclude that whole categories of matters should not even be considered for possible referral to some ADR process.

At this juncture, I return to the primary question that we address in this section: in which circumstance, if any, should a judge order participation in ADR over a knowledgeable made objection? In the remainder of this section, I will assume that the judge who is wrestling with this question is dealing with a kind of case that does not have any of the obvious indicators of possible “unsuitability” for ADR that I identified in the preceding paragraphs.

Before turning to more difficult aspects of this question, it is important to note that practical considerations can play a significant role in a judge’s resolution of this issue. For example, a judge obviously should not order a case into ADR unless an appropriate<sup>4</sup> neutral will be available within a practicable time frame. And if participation in ADR would impose any substantial cost burdens, the judge should be sure to consider whether the parties have the resources to bear those burdens, and whether the likely benefit of the referral justifies the imposition. The judge also should take steps to assure that an economically more powerful litigant cannot use the ADR process to impose straining expenses on an economically vulnerable opponent.

Assuming no insurmountable practical barriers to ordering a referral, what kinds of things should a judge think about (and address with the parties) when she tries to decide whether or not to order a given case into ADR over at least one party’s objection?

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<sup>4</sup> In this context, “appropriate” means, among other things, a neutral who does not have any real or apparent conflict of interest or any other ethically disqualifying circumstance; who possesses the pertinent process skills and attributes of character and intellect, and, where called for, who has any necessary subject matter expertise.

I begin by urging judges to attend carefully to *thoughtfully* based objections to participating in ADR. It is to try to improve the odds that such objections will be thoughtfully based that I have offered the suggestions in section one of this essay. By responding to the parties' questions and concerns along the lines I have suggested above, judges can correct misunderstandings and provide lawyers and litigants with at least the basic information they need to make an informed decision about the possible use of ADR. The question we face here is the following: should a judge (who has authority under pertinent rules to do so) ever *order* a party to participate in an ADR process even if the judge is satisfied that the party's declination to participate voluntarily reflects a "considered" decision.

If a party's rejection of an invitation to try ADR really does appear to be thoughtful, I believe a judge should give that fact considerable play in deciding whether to refer the case to ADR over that party's objection. While it is not true that an ADR proceeding can only "work"<sup>5</sup> if parties enter it with an appropriately open spirit and a genuine desire to capitalize on its potential, the risk that the ADR undertaking will not yield sufficient benefits to justify the burdens it imposes probably increases substantially if a party who has a reliable understanding of the pertinent considerations decides against participation. Therefore, I think a considered declination should create a presumption against ordering a referral, and if the considered declination is by both sides (all parties), then that presumption should be quite sizeable.

What are some of the considerations to which a judge should attend when trying to decide whether the presumption should be overcome? At the outset, the judge should focus on the purposes of the court's ADR program and on what the purposes of referring the specific case to ADR would be.

If the central value inspiring the ADR program is to enhance party self-determination,<sup>6</sup> and if the only ADR process to which referral could be made is facilitative mediation, then compelling a party to participate over his well-informed objection would seem difficult to justify. Of course, the judge should

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<sup>5</sup> What the word "work" means can vary substantially with the purposes of the ADR program and the values and interests of the participants. Many ADR proceedings, for example, "work" even though they produce no settlement. They might "work" by helping the parties acquire in a cost-effective way important information or understandings. They might "work" by making litigants feel that the justice system has really tried to be responsive to their needs and circumstances. They might "work" by permitting party participation to a degree and in a manner that traditional litigation would not permit. They might "work" by providing a valued forum for communication, for self-expression, or for efforts at self-repair. They might "work" by contributing to the efficiency and rationality of the pretrial process and the trial. The list could go on.

<sup>6</sup>GA. A.D.R.R. app. C.; *see also* FLA. R. CERTIFIED AND COURT-APPOINTED MEDIATORS 10.230.

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be sure that the *client* is making the decision to decline to participate, and that he is doing so after being informed fully about all the pertinent considerations. But if the judge sits in a court where the primary purpose of the ADR program is party self-determination, and if the judge is satisfied that it is the client who is making the decision (not just the lawyer), and that the decision is fully informed, then in my view, it would not be appropriate to compel that party to go to a mediation session.

In contrast, if the primary purpose of the ADR program is to increase the incidence or accelerate the timing of settlement, or if the primary purpose is to increase the efficiency and enhance the rationality of the pretrial process, there might be circumstances in which compelling party participation even over a well-informed objection would be justified. In making this decision in any given case, the judge should consider carefully what the objections are and how strongly they appear to be felt.

In some instances, objections are more postured than sincerely held. Some lawyers (and clients) seem to fear that showing any interest in mediation, for example, is likely to be construed by their opponents as a sign of weakness (infirmity of belief in the merits of the parties' position or lack of resolve to see the litigation through). A judge who has a sense that this kind of fear might be playing any role in a party's articulated reluctance to participate in ADR might respond by saying:

**JUDGE:**

*I know that sometimes parties are concerned that if they agree to ADR their opponent will think that they are anxious to settle and that they lack confidence in their case, but I have seen many instances where just the opposite is true. Often it is the parties with the strongest case and the most experience with mediation who are most interested in using ADR. It is a sign of strength to be willing to expose your case to a neutral third party—a sign that you are not afraid of what a third party will think or say about your case—that, in fact, you welcome that input because you are confident it will be favorable.*

If the objection appears to be sincere (not postured), but is based on misplaced distrust of ADR that the judge has not been able to dispel, or if the objection is based on a lawyer's opinion that an ADR session is not likely to be worthwhile, but the judge does not share that view, I think the judge should actively consider making the reference over the party's objection. I also think the judge should be open with the parties about her thinking; she should tell the lawyers where her assessment differs from theirs, and why. Having this kind of

open exchange with the parties offers the judge an opportunity both to teach and to learn—to provide the parties with more information and a different perspective about ADR, and to probe more deeply (as counsel respond to the court's thinking) into the sources of the parties' reluctance to participate in one of the alternative processes.

Often the judge will have information (from her own court or from studies in other courts) about how litigants who did not volunteer to participate in ADR assessed the value of their ADR experience after the fact. Armed with this kind of information, a judge might say something like the following:

**JUDGE:**

*As you know, for many years parties in this court have been constrained by local rule to participate in ADR. For many kinds of cases, including some like yours, the referrals have been automatic and presumptively mandatory. And because our programs have been studied several times by professionals from outside the court, we have a lot of information about what such parties thought, after the fact, about the fairness and the utility of their ADR events.*

*These studies show that a large percentage of the parties who participated in ADR only because they were ordered to, and who expected little or nothing from the process, ended up feeling not only that the ADR session was completely fair, but also that it turned out to be much more useful than they had expected. In fact, most of the lawyers who have been ordered to participate have reported that in the future they would volunteer other cases of theirs into the program.*

To try to identify ways to remove perceived barriers to an ADR process being productive, the judge also might ask counsel if there is any change in circumstance that might change the lawyer's assessment of the likelihood that an ADR process would be worth trying. The judge might ask the following:

**JUDGE:**

*Counsel, given your knowledge of all the circumstances here, what would need to be different, or what change would need to occur, before, in your judgment, it would be sensible to give ADR a try?*

(Consider counsel's response.)

*Is there something the court could do, or that another party or lawyer could do, that might move the case into a position where ADR*



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*would be more likely to yield benefits?*

In response to this kind of question, a lawyer might suggest that he needs more discovery, or that his client needs time to work on some situation outside the case that affects the client's decisions within the case, or that until the court rules on a specific legal question his client will not be open to any ADR process or to any settlement proposals. In Part A, above, I suggested some possibly pertinent responses to these kinds of objections. But a judge who hears any of these kinds of responses should continue to probe. For example:

**JUDGE:**

*What specific discovery do you need, and why or how will the results of that discovery affect your thinking about how useful ADR might be?*

The purpose of such probing, however, is not simply to expose groundless reasons for resistance to ADR. The judge needs to listen thoughtfully to the parties' responses and to be open to being persuaded that a referral to ADR really is not appropriate, at least at the juncture this dialogue is taking place. Sometimes the wisest course will be to accept counsel's suggestions and at least to postpone a final decision about whether to refer the matter to ADR until after specified tasks have been completed (*e.g.*, the depositions of two key witnesses have been taken, or tests on an accused product have been completed). When the judge elects to postpone this decision, she should set a follow-up case management conference for a date certain to re-address the issue of whether to refer the case to some form of ADR.

But assuming that the case in question does not carry one of the obvious indicators of probable unsuitability for ADR,<sup>7</sup> are there kinds of informed objections that should make a judge think long and hard before ordering parties to participate in an ADR process at any juncture in the pretrial period? Are there kinds of objections that probably should persuade the judge not to refer the case to any form of ADR? For starters, I point to what I call the "genuine philosophic" objection. It runs as follows:

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<sup>7</sup> See discussion *supra* at pp. 202–09.

## LAWYER:

*Your honor, we are grateful for the care you have demonstrated about our case. We have shared all of the court's literature and all of your comments with our client. Our client, with our assistance, has considered carefully all of the possible benefits that might follow from participation in the ADR processes the court sanctions.*

*Our client asks us, however, to share respectfully with the court his sincerely held but fundamentally different view. Our client does not want to be forced to negotiate with his opponent in this case. He also does not believe that the established tools of pre-trial procedure are inadequate to enable all of us to prepare efficiently and fairly for trial.*

*Our client feels strongly that his rights under the law have been violated and he wants those rights vindicated and enforced in this case through the public trial and judgment to which he is entitled under the Seventh Amendment. As a citizen whose taxes support the court system, our client believes that his access to trial should not be impaired by economic or procedural burdens that are not necessary to assure that the trial will be fair. So he asks us to ask you not to refer this case to any form of ADR.*

## JUDGE:

*Satisfied as I am that your client has made a fully informed decision about this matter, I will not order him to participate in ADR. Let's pick a trial date and set the rest of the pretrial schedule.*

As this hypothetical judge's response indicates, I would not compel a fully informed client who took this position to participate in ADR. While the ADR Act of 1998 gives federal district courts the discretion to compel parties, over objection, to participate in ENE or mediation,<sup>8</sup> I do not believe that federal judges should use that discretionary power to order a litigant like the one described above to go through an ADR process. If the purpose of the ADR referral would be to encourage settlement, then that purpose very likely would be frustrated. If the purpose of the referral would be to enhance party self-determination, then that purpose already has been achieved, by hypothesis, for this particular litigant: he has self-determined that he wants his dispute resolved by trial. As emphasized above, there are many other purposes or values that an

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<sup>8</sup> 28 U.S.C.A. § 654 (West 1993 & Supp. 2000).

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ADR referral might promote, but it is not clear enough to me that forcing a party with this considered view to participate in ADR is likely to contribute enough to the achievement of any of those other purposes to justify the disrespect for his constitutionally rooted position that would be reflected in an order compelling him to participate in ADR.

There is another kind of objection to a proposed referral to ADR that judges would be well-advised to heed. This kind of objection builds from a sophisticated understanding of the multiple possible purposes of ADR and persuasively contends that, for reasons specific to the matter at hand, a referral would not contribute appreciably to achievement of any of those purposes. To be credible, such objections would have to be interposed by lawyers who had a deep, experience-based understanding<sup>9</sup> of each of the ADR options that the court has available. The clients (on both sides) also would have to be sophisticated about ADR and about litigation (*e.g.*, risks, transaction costs, and procedural possibilities). Assuming both of these conditions are met, a persuasive objection might be presented as follows:

**LAWYER:**

*Your Honor, as you know, I have served as a neutral for many years in this court's mediation and ENE programs. I have attended the trainings and I have been selected as the neutral in each program at least ten times. I also have represented clients in mediations or ENEs on many occasions. Both my client and our party opponent have participated in and advocated the use of various forms of ADR for at least a decade.*

*Both parties are sophisticated, repeat institutional players in this kind of litigation. They know what the issues are in this kind of case and they know what kinds of evidence are likely to be significant. In*

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<sup>9</sup> Sometimes lawyers who have participated in only a few "mediations" believe that they understand all ADR processes and all of the potential of mediation. These beliefs are quite likely to be unfounded. There are many different kinds of mediation and many different kinds of mediators. To fully understand the potential even of this one process, a lawyer would have had to have participated (preferably as a mediator and as an "advocate") in a wide range of processes and worked with many different neutrals—so he could see the full range of approaches and learn how much the value of any given mediation depends on the skill and personality of the human being who is serving as the mediator. And even lawyers who know mediation thoroughly may well know little or nothing about ENE, summary jury or bench trials, mini-trials, and non-binding arbitrations under 28 U.S.C. 654. So judges should greet with some skepticism lawyers' generalized claims about how much they understand ADR.

*fact, because of the pre-filing investigation they both have done, and the disclosure and discovery activity that we already have completed, the evidence is pretty well developed.*

*Given these facts, neither party really needs the input of a neutral to assess the strengths and weaknesses of their position, or to help streamline case development. We also do not need help making sure we are communicating clearly—we have discussed virtually every aspect of this matter ad nauseam but always in mutually respectful ways. And this is not a matter where emotions have run high or need to be vented—the decisions are being made by experienced corporate professionals based really on only one thing: money.*

*Unfortunately, there is a great deal of that at stake in this case—so there is no disproportion between transaction costs and judgment value here. Equally unfortunately, we disagree deeply about how the trier of fact will react to the testimonial and documentary evidence. Each of us has even presented the evidence, including the competing testimony of the experts, to jurors we hired for mock trials.*

*We know we have a duty to try to settle cases, and we have tried hard to do so. However, all of us are now convinced that there is no prospect of this case settling—it will be resolved only by trial. So, in this rare instance, we respectfully ask that you not order us to participate in the ADR program because it is foreseeable that doing so will not help us or the court in any significant way.*

JUDGE:

*Knowing what I know about you, your clients, and this case, I agree. Let's get ready for trial.*

While this response clearly will be appropriate in some circumstances, it would be a mistake to assume that such circumstances are common. Experience in our court has shown that even good lawyers who are well-informed about ADR often underestimate the potential of a well-hosted ADR event. Before the ADR fact, they sincerely believe that no ADR process holds any real promise. But after the ADR fact, they are grateful that they were pushed to participate because they ended up accomplishing worthwhile things in the session.

What such lawyers underestimate, I think, is the extent to which the ADR event itself can have a crucial effect. Led creatively by a skilled and respectful neutral, a mediation or an ENE can create a dynamic that otherwise would never have a chance to take shape. More than occasionally that dynamic yields a shared will, or at least a surprising willingness, either to find overall solutions or to make the remainder of the disputing process more civil and more efficient. So the

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ADR event can generate energy and offer otherwise non-existent opportunities to channel that energy constructively.

The moral of all this is that a judge who hears what appears to be sophisticated objections to referring a case to ADR needs to listen, simultaneously, with both care and skepticism. After listening, the judge should probe with respectfully phrased questions to determine whether the case really presents one of the exceptional circumstances in which the complex promise of ADR is insufficient to justify making the referral.

